No. 06-542

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IN THE

Supreme Court of the United States

D. F., by his Parent and Natural Guardian, ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PETER J. BIGING
Counsel of Record
JENNIFER H. FELDSCHER
LEWIS BRISBOIS BISGAARD & SMITH LLP
199 Wall Street, 25th Floor
New York, New York 10038
(212) 232-1300

Counsel for Respondents

205537

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the context of a school disciplinary hearing where the Petitioner was given notice of the charges against him, an opportunity to present evidence in his behalf, an opportunity to be represented by counsel, an opportunity to cross-examine all witnesses against him, and the right to subpoena and have brought to the hearing all witnesses he believed were necessary to enable the hearing officer to render an appropriate decision, there is any question as to whether Petitioner was not given sufficient procedural due process because the hearing officer agreed to accept into evidence anonymous statements of students as to how they felt about the Story giving rise to the disciplinary hearing at issue.

2. Whether, in the context of pleadings specifically referencing and incorporating the content of a story depicting the Petitioner stalking and killing his fellow students in gruesome ways, depicting 10 and 11 year old boys and girls engaged in sexual activities, depicting a specific classmate in various states of undress and at one point having her clothes being held in front of her to shield her naked torso from view ripped from her hands, engaged in sexual activity, and being physically assaulted by the Petitioner, and referencing and incorporating by reference the record of an evidentiary hearing at which the Petitioner admitted to writing the story and his mother admitted to his having acknowledged having read it to certain classmates (including the little girl he stalked in the story and depicted in the manner discussed above), the District Court had a sufficient basis for concluding that the story represented a true threat and/or the potential for substantial disruption to school activities so as to permit the imposition of discipline without such discipline amounting to a First Amendment violation.

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INTRODUCTION

A simple internet search for information concerning school violence reveals a truly frightening reality: school violence is an enormous, worldwide problem, and threats of school violence must be taken *very* seriously. Indeed, it is sadly well known that very young children have shot and killed other students on what has now become an all too numerous set of tragic occasions over the last decade.[1] How school administrators respond to this reality, and how the Federal District Courts analyze the constitutionality of their conduct in attempting to protect students from the threat of school violence is an issue that is clearly one that merits serious consideration. However, this case is an example of how laws and procedures now in place, when followed, provide a highly sufficient basis for protecting the rights of students accused of conduct in violation of school disciplinary codes. This is NOT a case that should require this Court to give a moment's pause to consider whether the Petitioner was given all the constitutional due process he was due. Neither is it a case which this Court should wonder whether the courts below acted in a fashion that calls into question the legal sufficiency of their conclusion that, in this case, on the record before them, the Petitioner could reasonably be concluded to have engaged in speech which either constituted a true threat, or which could be concluded to have reasonably been forecast to have caused substantial disruption to school activities and/or impinged upon the

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[1] In *Commonwealth v. Milo M.*, 740 N.E.2d 967, 973 (Sup. Jud. Ct. Mass. 2001), the Court, making reference to a number of publicized school shooting incidents, stated it could "take judicial notice of the actual and potential violence in public schools" and the "climate of apprehension" concerning school violence which exists as a result.

rights of other students if not considered by the school's administrators, reviewed, and made the basis for a disciplinary action.

In this case, a 10 year old student at a Long Island, New York middle school wrote a story about himself and his fellow classmates that depicted him as a troubled, angry young boy who stalks and murders a number of his fellow classmates. In his story, as well, he depicted fellow 10 and 11 year old students engaged in sexual activity, and one particular young girl "making out topless," sleeping with another student, being viciously assaulted by the Petitioner, and having clothes she was holding in front of her naked torso ripped from her hands by the Petitioner before he assaulted her. In both his complaint, and in the record of the disciplinary hearing referenced in the complaint, it is acknowledged by the Petitioner (and his mother) that he repeatedly tried to read the story to other classmates, and actually succeeded in doing so with several of them, including the young girl he stalks throughout the story, and who is depicted in such a sexually charged manner.

Considering the pleadings, and considering the record of the evidentiary hearing incorporated by reference therein, the District Court concluded that dismissal of Petitioner's procedural due process and First Amendment claims was appropriate, and the Second Circuit sustained the decision upon review. Petitioner argues that the District Court and Circuit Court of Appeals rulings were improper, in failing to conclude that the evidentiary hearing held with respect to a consideration of whether any discipline beyond the middle school principal's issuance of a five day suspension was merited was fatally flawed because the hearing officer allowed into evidence statements of anonymous students

regarding how they felt about the story. However, this contention ignores the fact that the due process given to Petitioner complied with the level of due process required both under New York state law and all iterations of the minimum level of due process required in the context of school disciplinary proceedings that have been made by the various Circuit Courts. Petitioner further argues that the District Court erred in finding that there was a "true threat" without first permitting the parties to engage in discovery, and rule upon testimony and evidence developed pursuant to federal discovery. But the fact is that the District Court appropriately had before it the story, admissions in the pleadings of the critical conduct in issue made in the Complaint, and the record of a full evidentiary hearing which it correctly considered on the motions to dismiss in light of Petitioner's having relied upon and incorporated by reference the record into the pleadings.

The Complaint and record properly before the courts below make clear that Petitioner wrote a truly disturbing story which, at very least, was something that could be perceived as demeaning of, harassing, and embarrassing to the little girl who is the main focus of the story. The Complaint and record make clear, as well, that the Petitioner admitted having attempted repeatedly to read the story to his classmates, and succeeded in doing so on a number of occasions. And the Complaint and record before the courts below make clear that once consideration was given to the potential for imposition of disciplinary charges above the 5 days he was originally suspended by the principal, Petitioner was provided with advance notice of the charges being proffered against him (and the factual basis therefore), advance notice of the disciplinary hearing, an opportunity to retain counsel, an

opportunity to present his side of the case, an opportunity to subpoena witnesses, and an opportunity to cross-examine the witnesses presented against him.

For these reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

COUNTERSTATEMENT OF THE CASE

The Petitioner — by his parent and guardian, Andrew Finkle — is a young boy who is now 12 years old. A little over two years ago, when he was 10, and in the sixth grade, he wrote a story in his journal at school (the "Story"), which he tried to read aloud to his English class and at a lunch study program referred to as "Latin at Lunch." (Am. Cmpl ¶¶ 18, 21) (Pet. App. 0038) [JA 27][2] The Amended Complaint filed by Petitioner specifically acknowledges that Petitioner wrote the Story, and made repeated efforts to read it to his fellow classmates, and in her testimony at the disciplinary hearing made the subject of the lawsuit, Petitioner's mother acknowledged that Petitioner had admitted to her having read the story to other classmates, including a young girl featured prominently in the narrative named "Shanna". (Am. Cmpl. ¶¶ 17-21) (Pet. App. 0037-0038) [JA 27].

In the Story [JA 49-63], Petitioner describes a boy with Petitioner's name who outwardly seemed bright and happy, but inwardly was filled with anger and rage at his fellow students. [JA 49] The Story contains graphic depictions of murder of these students by Petitioner, and scenes in which

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[2] References to all documents in the Joint Appendix, which was before the U.S. Court of Appeals for the Second Circuit, will be made to "JA ___."

a female classmate ("Shanna"), is initially stalked by him, witnesses him kill her boyfriend, and is later described as "making out topless on a table" with another boy, before being come upon by Petitioner, who kills this boy as well, and in his rage, attempts to kill her also. [JA 51-52 & 60]. Thereafter, after being viciously kicked against a wall by Petitioner, and having the shirt she was holding in front of her to shield her naked torso ripped from her hands, Shanna, with "[b]lood . . . pouring out of her mouth," responds by kissing him and thereby saving herself. [JA 61] In a separate section, another girl having sex with a boy is witnessed by Petitioner, and then brutally killed by him as well. [JA 62].

After reading portions of the Story at the start of his English class, while his teacher was distracted and paying attention only to taking attendance, the Amended Complaint alleges that Petitioner was unsuccessful in his efforts to read the story to the "Latin at Lunch" group. (Am. Cmpl. ¶¶ 18, 22) (Pet. App. 0038) [JA 27] Before permitting Petitioner to read the story, his teacher, Diane St. John, had asked Petitioner if she could read it, and then did so. (Am. Cmpl. ¶ 22) (Pet. App. 0038) [JA 27] Seeing the sexual and graphically brutal content of the Story, and learning from Petitioner that children identified in the Story were Petitioner's classmates, Ms. St. John brought the Story to the attention of the school's Principal, James Kassebaum. (Am. Cmpl. ¶ 25) (Pet. App. 0039) [JA 28] After deliberation as to how to address the situation, Mr. Kassebaum notified and met with Petitioner's parents (along with Assistant Principals Gail Grenzig and Roger Bloom, and the school psychologist, Marcus Crenshaw) to discuss a planned initial 5 day suspension, and potential further suspension following a hearing to consider the circumstances and the appropriate disciplinary measures to be taken. (Letters Advising of Suspension and Hearing) [JA 320-321]

Subsequently, upon notice to Petitioner's parents, an independent hearing officer was appointed, and a hearing was held at which the Story was reviewed, testimony from Ms. St. John, Phillip Kaiser (D. F.'s Sixth Grade teacher), Gail Grenzig (the school's assistant principal), Principal Kassebaum, and Petitioner's parents was given, and consideration was given to whether Petitioner had violated the following sections of the school's Code of Conduct:

- Section D(5), providing that a student may not "[e]ngage in conduct that is violent";

- Section E(5), providing that a student may not engage in conduct that "endangers the safety, morals, health or welfare of others," including "[h]arassment, which includes a sufficiently severe action or persistent pervasive pattern of actions or statements directed at an identifiable individual or group which are intended to be, or which a reasonable person would perceive as ridiculing or demeaning"; and

- Section E(6), providing that a student may not engage in conduct that "endangers the safety, morals, health or welfare of others," including "[i]ntimidation, which includes engaging in actions or statements that put an individual in fear of bodily harm."

(Hearing Officer's Findings; Hearing Transcript; Code of Conduct) [JA 80-312]

At the commencement of the Hearing, before any testimony was taken, the Hearing Officer advised that in addition to having a right to be represented by counsel, and to present witnesses and other evidence on his own behalf, Petitioner had "[t]he right to confront and cross-examine all witnesses, and if there are witnesses you would like to have testify who are not here now, your attorney can issue a subpoena to have them be present and testify." [JA 830]. The hearing officer also explained the burden of proof, discussed the manner in which the hearing would be held, and explained the procedures that would be followed in determining the appropriate measure of discipline to impose in the event she first concluded that Petitioner was guilty of the disciplinary code violations in issue. [JA 146-148] Petitioner's parents were present at the hearing and testified on his behalf, and Petitioner was represented by an attorney who conducted cross-examination of the witnesses, and offered evidence of Petitioner's character. [JA 96-97, 148-155, 179-184, 197-202, 209-251] Although Petitioner's attorney objected to the introduction into evidence of certain journal entries made by students in Petitioner's English class regarding how they felt about Petitioner's Story (including a journal entry by Shanna) [JA 136-147], no request was made for permission to subpoena Shanna or any of the other students and have them made available for cross-examination.

Following the hearing, the hearing officer specifically noted the Finkles' argument against the imposition of any further discipline, pointing out that:

> The Finkles argued that [Petitioner's] writing is a piece of creative literature and that it is not responsible or objective to expect that anyone would fear bodily harm. His writings are a rip off

> of the Halloween movies. That it is creative work in connection with [Petitioner's] English class. It is protected freedom of expression and speech, and that there is no true threat to any individual.
>
> The Finkles argued that there is no evidence that [Petitioner] threatened to use a weapon; that his journal is creative literature and not violent conduct within the meaning of the Code of Conduct, Section D(5). The Finkles argued that [Petitioner] was not charged with a violation of Code of Conduct Section E(5), harassment, in the notice of charges (D.Ex.2), and therefore this charge must be dismissed. They further argued that [Petitioner's] actions were not sufficiently severe or pervasive. That his writings were not demeaning to his characters. Finally, they argued that [Petitioner] did not violate Code of Conduct Section E(6), intimidation, because [Petitioner] did not make any true threats against any other individuals and the District failed to produce evidence of a true threat against anyone. They argue that the District witnesses said individuals were "offended" by his writing and that this is not covered by the intimidation provision of the Code of Conduct.

(Hearing Officer's Findings at 10) [JA 331] However, after considering all the evidence presented at the hearing, and considering the credibility of the witnesses, the hearing officer concluded that each of the Code of Conduct sections in question had been violated, and that a suspension of 30 days — with credit given for the days Petitioner had been suspended prior to the hearing — would be appropriate.

[JA 336] This recommendation was adopted by the School's Superintendent, Carole Hankin. (Hearing Officer's Findings at 16-17; Am. Cmpl. ¶ 59) [JA 337-338, & 34-35] (Pet. App. 0045).

Petitioner's parents thereafter appealed the Superintendent's decision to suspend Petitioner for 30 days to the School District, and the School District denied the appeal. (Am. Cmpl. ¶ 63) (Pet. App. 0045) [JA 35] They also appealed to the Commissioner of Education, who denied a stay of the suspension, and then after the suspension had been completed, determined that the appeal was moot. (Am. Cmpl. ¶ 64) (Pet. App. 0045-0046) [JA 35] Eschewing Article 78 relief in state court, Appellant then commenced this action. [JA 6-22]

After full briefing of the issues, oral argument was held before the District Court on July 28, 2005, upon a record which included the Amended Complaint, the Story, the various written notices provided to the Finkles regarding the charges against Petitioner, his initial 5 day suspension and the scheduling of a hearing regarding the charges, the minutes of the hearings held on October 14, 2003 and October 21, 2003, the hearing officer's findings and recommendation, and the relevant provisions of the Board of Education's Code of Conduct. The District Court then issued a decision granting the defendants' motions to dismiss. [JA 389-413] The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court in an unpublished opinion, on or about August 1, 2006.

REASONS FOR DENYING THE PETITION

A. THE PROCEDURAL DUE PROCESS AFFORDED TO PETITIONER WAS FULLY IN COMPLIANCE BOTH WITH NEW YORK STATE LAW AND ALL FEDERAL COURT ITERATIONS OF THE LEVEL OF DUE PROCESS REQUIRED IN SCHOOL DISCIPLINARY PROCEEDINGS WITH REGARD TO POTENTIAL SUSPENSIONS IN EXCESS OF 10 DAYS, AND ALTHOUGH ANONYMOUS STUDENT STATEMENTS WERE TAKEN INTO EVIDENCE, THERE IS NO REQUIREMENT THAT DISCIPLINARY PROCEEDINGS NOT BE CONDUCTED IN SUCH A WAY AS TO TAKE INTO ACCOUNT CONSIDERATION OF THE RIGHTS AND INTERESTS OF MINOR CHILDREN, THE STATEMENTS WERE NOT CRITICAL TO THE HEARING OFFICER'S RULING, AND THE PETITIONER AT ALL TIMES HAD THE RIGHT TO REQUEST THAT WITNESSES BE SUBPOENAED TO TESTIFY AT THE HEARING, BUT CHOSE NOT TO DO SO

As Petitioner correctly states in his Petition,

> "[t]his Court has consistently held that the procedural due process that is required varies depending on the nature of the private interest involved, the risk of an erroneous deprivation through the procedures that are used, the probable value of additional or substitute procedures, and the burden upon a government caused by any additional or substitute procedural requirements."

(Petition, p. 9) (citing *Zinermon v. Burch*, 494 U.S. 113 (1990)). The benefit of the law as it exists is that it doesn't try to create an enormously complicated structural system to address how a fair hearing may be given under every possible circumstance, while it, at the same time, provides that important interests are balanced, such that hearings are conducted in a fair manner. It also permits flexibility for "procedures to be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Mathews v. Elridge*, 424 U.S.319, 349 (1976) (internal quotation omitted).

The circuit courts have also consistently applied this balancing test in the context of student suspension hearings and have generally imposed certain basic requisites for ensuring that a student facing school discipline is afforded due process. For example, in *J.S. ex. rel. Duck v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 681-682 (F.D. Va. 2005) and in *Gomes v. University of Maine System*, 365 F. Supp. 2d 6, 16 (D. Me. 2005), it was suggested that minimum requirements of procedural due process in a school disciplinary hearing involving possible expulsion or lengthy suspension are met where: (1) the student is advised of the charges against him; (2) the student is informed of the evidence against him; (3) the student has an opportunity to be heard in his own defense; (4) no punishment is issued except upon substantial evidence; (5) the student is permitted the assistance of a lawyer; (6) a hearing is held at which the student is permitted to confront and to cross-examine the witnesses against him; and (7) the witness is afforded the right to an impartial tribunal, which must make written findings. *See Gomes*, 365 F. Supp. 2d at 16; *J.S. ex. rel. Duck*, 62 F. Supp. 2d at 681-682; *see also Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989); *Newsome v. Batavia Local School*

Dist., 842 F.2d 920, 923-24 (6th Cir. 1988); *Gorman v. University of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988); *Nash v. Auburn University*, 812 F.2d 655, 660 (11th Cir. 1987).

In discussing the requirements of procedural due process in a school disciplinary hearing, the court in *Gomes*, quoting the First Circuit's decision in *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14, 16 (1st Cir. 1988), noted that:

> In fostering and insuring the requirements of due process . . . the courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method. Rather, on judicial review the question presented is whether, in the particular case, the individual has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.
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> . . . .
>
> [T]he courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process. "[T]he Due Process Clause requires 'not an elaborate hearing' before a neutral party, but simply 'an informal give-and-take between

> student and disciplinarian' which gives the student an opportunity to explain his version of the facts'."

Gomes, 365 F. Supp. 2d at 17 (internal citations omitted).

For suspensions exceeding 5 days, New York law requires that the

> "pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which time such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf . . . ."

N.Y. Educ. Law § 3214(3)(c) (McKinney 2005).

In the present case, it is clear from the pleadings and the record appropriately before the courts on the defendants' motions that Petitioner was afforded procedural due process in his suspension hearing. The hearing was first commenced on October 14, 2003, but it was immediately suspended at Ms. Finkle's request, to permit her an opportunity to retain a lawyer. [JA 64-79]. Thereafter, on October 21st, a hearing was held at which Petitioner and his parents were present, counsel represented Petitioner, cross-examined the witnesses called to testify by the School District and questioned Petitioner's parents, and the hearing officer described at the outset Petitioner's rights and the procedures to be followed at the hearing. [JA 80-278]. A transcript of the hearing was prepared and made available to Petitioner [JA 80-278], and, by letter dated October 23, 2003, the hearing officer provided a report (a copy of which was faxed to Petitioner's attorney)

detailing the evidence and testimony presented at the hearings, her factual findings, the arguments of counsel, and her recommendations as to discipline to be imposed. [JA 323-338].

A review of the hearing officer's report and recommendation to Superintendent Hankin and the transcript of the hearing makes clear that Petitioner was afforded due process. Without question, the hearing officer's report and recommendation, and the transcript of the hearing, reveal that Petitioner's arguments were heard, and understood — all of them. He received a fair hearing.

Petitioner argues in his Petition that the hearing officer's decision to allow introduction into evidence at the hearing of written statements made by students in Petitioner's class concerning their thoughts, feelings or concerns they had about the Story [JA 67-84] violated Due Process. However, his argument is flawed in three major respects. First, the introduction into evidence of anonymous written statements in a school disciplinary hearing does not violate Due Process when viewed in the context of this particular case. As the District Court stated in its decision below:

> "[T]he School's interest in protecting the identities of the students outweighed any interest in cross-examination of them the Plaintiff may have had. Overall, Plaintiff was afforded the procedural protections to satisfy his due process rights; he was given a hearing, given sufficient notice of the hearing, and permitted to present a defense of his behavior with counsel. He offered his own parents to testify on his behalf. On the other side of the balance sheet, the School District had a keen

> interest in keeping the identity of the students confidential. The School District reasonably considered Plaintiff to be potentially violent, and by not disclosing the names of the students the School District was protecting them from possible retaliation by Plaintiff."

[Petition, APP 0012].

The District Court appropriately balanced the interests of Petitioner with the interests of the School District in protecting students from possible retaliation. This analysis is consistent with other decisions in this circuit and other circuits. *See Flaim v. Medical College of Ohio, et al*, 418 F.3d 629, 641 (6th Cir. 2005); *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986); *Winnick v. Manning*, 460 F.2d 545, 549-550 (2d Cir. 1972).

Second, this Court has stated that "[a]ll that is necessary to satisfy due process is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349 (internal quotes omitted). In this case, cross-examination of the students who wrote the statements was not necessary for Petitioner to have a meaningful opportunity to present his case, and Petitioner cannot establish substantial prejudice in theoretically not having the opportunity to do so. *See Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001) ("In order to establish a denial of due process, a student must show substantial prejudice from the allegedly inadequate procedure."). The critical issue was whether the school administrators

reasonably perceived the Story to constitute a threat or reasonably forecast substantial disruption to school activities or impingement upon student rights. Although Shanna's statement introduced at the hearing indicated the story made her uncomfortable, the people whose assessments of the situation were most critical and who had the relevant knowledge and information were the teachers and school administrators who perceived the Story as a threat, each of whom was available to be cross-examined at the hearing. [JA 96-97, 148-55, 179-84, 197-202, & 209-51]. In addition, since Petitioner admitted that he wrote the Story for class and attempted to read it aloud — most of the critical facts were undisputed, rendering cross-examination of certain students unnecessary. *See, e.g, Flaim v. Medical College of Ohio, et al*, 418 F.3d 629, 641 (6th Cir. 2005) (holding that cross-examination was not essential where "it was not a choice between believing an accuser and an accused."); *Porter, et al v. Ascension Parish School Board, et al*, 393 F.3d 608, 624 (5th Cir. 2004) ("Whether a student admitted the charges leveled against him is relevant in determining substantial prejudice or harm.") (internal citation omitted); *Watson v. Beckel*, 242 F.3d 1237 (10th Cir. 2001) (holding that a student who was expelled without being afforded sufficient process was not prejudiced because he admitted his guilt); *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) ("holding that a student was not entitled to relief on due process claim because he admitted all the essential facts which it is the purpose of a due process hearing to establish."); *Winnick v. Manning*, 460 F.2d 545, 549-550 (2d Cir. 1972) (noting that "[t]he right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings").

Third, at the outset of the hearing, before any testimony was given and before any documentary evidence was proffered, the hearing officer specifically advised that Petitioner had "[t]he right to confront and cross-examine or question all witnesses, and if there are witnesses you would like to have testify who are not here now, your attorney can issue a subpoena to have them be present and testify." [JA 83]. Obviously, the attorney for Petitioner representing him at the hearing made the tactical decision to try to keep the student statements out of the record, while at the same time avoiding further intimidating the students by subpoenaing them, and avoiding the dangers presented to his client by having Shanna actually show up and testify at the hearing.[3] But this tactical decision should not obscure the fact that the opportunity was clearly presented — on the record — to Petitioner to have any witness not present at the hearing subpoenaed to testify. Given this opportunity, Petitioner simply has no basis to argue that the hearing afforded to him violated his rights to procedural due process, and no legitimate claim to the necessity, based on the facts in this case, for a Supreme Court assessment of each aspect of procedural due process specifically required in the context of school disciplinary proceedings such as the proceeding at issue in this case.

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[3] Instead, he relied upon Ms. Finkle to argue that Shanna would not have felt and did not feel uncomfortable, with her testimony at the hearing that she told Petitioner the Story "was gross, but it was okay." [JA 233]

B. THE DISTRICT AND CIRCUIT COURTS DID NOT ACT INCONSISTENTLY WITH THE OTHER CIRCUITS IN CONCLUDING THAT ON THE PLEADINGS AND RECORD PROPERLY BEFORE THEM IN THIS CASE PETITIONER'S COMPLAINT COULD PROPERLY BE DISMISSED AT THE PLEADING STAGE, IN LIGHT OF THE ALLEGATIONS AND ADMISSIONS MADE

This Court has clearly and unequivocally prescribed certain circumstances in which limitations can constitutionally be placed on speech. One such instance involves speech which constitutes a "true threat," and therefore is deemed not to be speech worthy of protection. *See Virginia v. Black*, 538 U.S. 343, 359 (2003). A second, in the context of student speech, arises when there is a reasonable basis for forecasting that such speech would "substantially interfere with the work of the school or impinge upon the rights of other studen..." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

As this Court has stated, "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group." *Virgina v. Black*, 538 U.S. 343, 359 (2003). In determining if speech constitutes a "true threat," it is not necessary to conclude that the speaker actually intended to carry out the threat or was even capable of doing so. *Id.* at 359-60. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002); *Planned Parenthood of the Columbia/ Williamette, Inc. v. Am. Coalition of Life Activist*, 290 F.3d 1058, 1075 (9th Cir. 2002). Additionally, under the test

adopted in the Second and a number of other circuits, it is not necessary to conclude that a reasonable person standing in the shoes of the speaker would foresee that the person reading or listening to the speech would perceive the statement as a threat; "[t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made." *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999); *cert. denied*, 527 U.S. 1040 (1999). *See Doe v. Pulaski*, 306 F.3d 616, 622 (8th Cir. 2002); *United States v. Malik*, 16 F.3d 45, 51 (2nd Cir. 1994), *cert. denied*, 513 U.S. 968 (1994); *United States v. Roberts*, 915 F. 2d 889, 890-91 (4th Cir. 1990).

As to where speech does not necessarily fall within the bounds of a "true threat," but school officials may nevertheless reasonably forecast substantial interference with school activities or impingement upon the rights of other students arising therefrom, limitations may also be constitutionally be placed on such speech even where the actual disruption has not yet taken place. Courts considering and applying the *Tinker* rule have noted that:

> *Tinker* does not require school officials to wait until disruption actually occurs before they may act. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d [524] at 529; *Karp v. Becken*, 477 F.2d [171] at 175. "In fact, they have a duty to prevent the occurrence of school disturbances." *Id.* (quoting *Karp*, 477 F.2d at 175). Forecasting disruption is unmistakably difficult to do. *Tinker* does not require that disruption will occur, "but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption." *Karp*, 477 F.2d at 175.

LaVine v. Blaine School District, 257 F.3d 981, 989 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002). *See Demers v. Leominster School Dept.*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003) (noting that "a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of school violence across th country").

In seeking review of the dismissal of Petitioner's claims by this Court, on the grounds that the Story and Petitioner's admitted conduct in disseminating it both constituted a "true threat" and gave rise to the threat of substantial disruption to school activities, Petitioner argues that both the District and Circuit Court acted contrary to the holdings of other circuits and this Court. However, while it is certainly true that in most instances the relevant facts concerning whether student statements or expressions constitute a "true threat" or give rise to reasonable concerns of threats of substantial disruption of school activities are not necessarily fully before the court in the pleadings, in this case all of the relevant facts were admitted by the Petitioner in the pleadings. And this included the statements made by his mother at the disciplinary hearing, incorporated by reference therein, expressly admitting that Petitioner had actually succeeded in repeatedly communicating the Story to other students, including the young girl Shanna, who is depicted in decidedly embarrassing, threatening and inappropriate ways.

This is significant because, as this Court has noted, "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). And in this case all of the evidence that was necessary to reach a conclusion as to whether the Respondents were justified in treating Petitioner's conduct as a "true threat" or something

which reasonably forecast substantial interference with school activities or impingement upon student rights was before the District Court and Court of Appeals, as part of — or incorporated by reference in — the pleadings, and it was entirely proper for the District Court and Court of Appeals to consider the allegations in the Amended Complaint, supplemented by the Story, notices provided to Petitioner of hearing, transcript of the disciplinary hearing, and the other documents contained in the Joint Appendix before the Second Circuit, because Petitioner had specifically referenced and relied upon these documents in his Amended Complaint. *See Cortec Industries v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992) (holding that a court may consider documents annexed to the movant's papers which, although not annexed to the complaint, plaintiff either had "in [his] possession or had knowledge of and upon which [he] relied in bringing suit"); *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (nothing, in dicta, that, on a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit"); *see also Thomas v. Westchester County Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002) (holding that the transcript and hearing officer's report from a female civil service employee's disciplinary hearing were properly before the court on the defendant's motion to dismiss, although the documents were mentioned only briefly in the Complaint).

Looking at the allegations in the Amended Complaint, the Story and the transcript of the disciplinary hearing, as well as records of the notices provided of the informal and

formal hearings available to Petitioner, the District Court and Court of Appeals could see:

- A story depicting Petitioner as a child suppressing deeply felt anger at his fellow students;

- A story depicting Petitioner, seeking revenge for being picked on, murdering a number of his fellow students in violent ways;

- Age inappropriate characterizations of sexual activity by ten year old students;

- Repeated references by Petitioner to his fellow classmate, Shanna, whom he depicts as being partially unclothed, engaged in sexual activity with another boy, and whom Petitioner stalks and physically assaults, while killing the boy she was "making out topless" with, as Shanna responds by wiping the blood from her mouth and kissing Petitioner and, as a result, saving herself;

- A drawing by Petitioner of him violently shaking Shanna [JA 59, 228];

- Repeated efforts by Petitioner to read the Story to his classmates. (Am. Cmpl. ¶¶ 17-21) [JA 27]; and

- An admission by Petitioner's mother that Petitioner had discussed the Story with other classmates on other occasions, and read the Story to Shanna [JA 232-33].

Whether or not the Story, and Petitioner's repeated efforts to read the Story to Shanna and his other classmates, could reasonably be perceived by the school's principal and superintendent as a "true threat" or as forecasting substantial interference with school activities or impingement upon the rights of others, is an issue that was determinable from the Amended Complaint (and the records relied upon and/or incorporated by reference therein). *United States v. Viefhaus*, 168 F.3d 392, 397 (10th Cir. 1999); *cert. denied*, 527 U.S. 1040 (1999). ("If there is no question that a defendant's speech is protected by the First Amendment, the court may dismiss the charge as a matter of law.") (citing *United States v. Malik*, 16 F.3d 45, 51 (2d Cir.1994)); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003) (affirming decision that there was no *Tinker* violation as a matter of law).

CONCLUSION

For these reasons stated above, it is respectfully submitted that the Petition for Writ of certiorari should be denied.

Respectfully submitted,

PETER J. BIGING
Counsel of Record
JENNIFER H. FELDSCHER
LEWIS BRISBOIS BISGAARD & SMITH LLP
199 Wall Street, 25th Floor
New York, New York 10038
(212) 232-1300

Counsel for Respondents